

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Preserving the Open Internet)	GN Docket No. 09-191
)	
Broadband Industry Practices)	WC Docket No. 07-52

**REPLY COMMENTS OF
THE INFORMATION TECHNOLOGY INDUSTRY COUNCIL**

August 26, 2010

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The Information Technology Industry Council (“ITI”)¹ submits these reply comments for the purpose of addressing the implications for this proceeding² (and other FCC proceedings as well) of the D.C. Circuit Court of Appeals decision in the *Comcast v. FCC* case. *See Comcast v. FCC*, 2010 WL 1286658 (D.C. Cir. 2010). As explained below, ITI believes that the FCC should release a separate notice in this and other affected proceedings for the purpose of assessing all of the implications of the *Comcast* decision. In the notice, the FCC should describe the jurisdictional basis it seeks to utilize in order to apply regulations to broadband Internet access service. In considering this issue, the Commission should focus on the implications of its jurisdictional proposal for investment by equipment manufacturers, network owners and applications, service and content providers. ITI continues to believe that retaining the

¹ ITI represents over 40 of the nation’s leading information technology companies. For more information on ITI, including a list of its members, please visit <http://www.itic.org/howeare/2010-member-companies>.

² *See Preserving the Open Internet, Broadband Industry Practices*, Notice of Proposed Rulemaking, 24 FCC Rcd 13064 (2009) (“NPRM”).

information service classification for broadband Internet access is the optimal means of encouraging investment and innovation throughout the Internet ecosystem.³

I. Discussion

In *Comcast*, the D.C. Circuit reviewed Comcast's appeal of the FCC determination that Comcast's network management practices with regard to the exchange of files using the BitTorrent networking protocol had violated FCC policy. The D.C. Circuit held that the FCC had failed to demonstrate that its regulation of Comcast's network management practices was "reasonably ancillary" to the "effective performance of its statutorily mandated responsibilities." *See id.* at *1. Among other things, the court held that, in seeking to exercise ancillary authority, the FCC may not rely on (1) provisions of the Communications Act such as Section 230(b) that set forth "congressional policy" without expressly delegating regulatory authority to the FCC (*see id.* at **10-15); or (2) other provisions of the Act that include a congressional delegation of authority (e.g., Section 623) where the FCC's ruling sweeps more broadly than the scope of the congressional grant of authority (*see id.* at *18). Importantly, the court did not foreclose FCC reliance on ancillary jurisdiction to regulate broadband Internet access where the FCC demonstrates that doing so is reasonably ancillary to an express congressional delegation of authority.

The *Comcast* decision has important implications for this proceeding and other pending and proposed Commission proceedings. For example, the decision implicates the proper jurisdictional basis for codification of the six principles proposed in the NPRM. In the NPRM, the Commission sought to rely on its ancillary jurisdiction to adopt regulations governing

³ Not all ITI members support each aspect of this pleading, and several ITI members are filing comments separately from ITI. Nevertheless, after extensive discussions among the ITI members, the companies have agreed that, considered as a whole, the proposals herein offer the most appropriate means of responding to the *Comcast* decision.

broadband Internet access service. The FCC sought comment on its view that adoption of such regulations would be reasonably ancillary to Sections 230(b), 706(a), 201(b) as well as several provisions in Title III. *See* NPRM ¶¶ 83-87. As explained, the reasoning in the *Comcast* decision forecloses FCC reliance Section 230(b). However, under the *Comcast* decision, the Commission could adopt regulations governing broadband Internet access if it demonstrates that doing so is reasonably ancillary to the express requirements of the Communications Act. Unfortunately, the FCC did not attempt such an analysis in the NPRM.

But the jurisdictional issues raised by the *Comcast* decision extend beyond the rules proposed in this proceeding. For example, on April 21, 2010, the Commission initiated a proceeding to explore ways of shifting federal universal service subsidies from supporting telephone service to supporting broadband service.⁴ Given that Section 254(c) defines universal service as an evolving level of “telecommunications service,” the FCC will need to assess the most appropriate jurisdictional basis for subsidizing broadband Internet access service.

In sum, the *Comcast* decision should prompt the Commission to undertake a comprehensive assessment of the appropriate jurisdictional basis for regulations applicable to broadband Internet access, both those proposed in this proceeding and those proposed in other proceedings. This can only be accomplished if the Commission provides parties with a sufficient opportunity to address all of these issues in response to a comprehensive agency request for comment. Accordingly, the Commission should release a separate notice for this purpose, citing each of the relevant pending agency proceedings.

The Commission should not, however, simply seek comments without describing its own views on the proper jurisdictional basis for regulations applicable to broadband Internet access

⁴ *See Connect America Fund*, WC Docket No. 10-90, Notice of Inquiry and Notice of Proposed Rulemaking (rel. Apr. 21, 2010).

service. Interested parties can provide the Commission with more constructive and targeted input if they have a sense of the agency's current thinking. The Commission should therefore include in its request for comments tentative conclusions regarding the most appropriate jurisdictional basis for the adoption of regulations applicable to broadband Internet access.

In so doing, the FCC should carefully examine the costs and benefits of each available jurisdictional basis for regulation. For example, in the past ITI has supported the classification of broadband Internet access service as an information service and opposed reclassification of that service as a telecommunications service. This is because the information service classification is likely to maximize innovation and investment by all participants in the Internet ecosystem, including equipment manufacturers, applications, content and service providers as well as network owners. ITI continues to believe that this is the case. Indeed, since the FCC adopted the information service classification, companies of all kinds have made investments based on the understanding that this classification would continue to apply. A significant change in the FCC's approach would force companies to reassess their investment plans. Most importantly, reclassification of broadband Internet access as a telecommunication service, even if accompanied by broad forbearance from enforcement of Title II requirements, would create the risk that a future FCC would seek to apply extensive Title II regulations to broadband Internet access service.

But regardless of the legal theory proposed by the Commission as the basis for applying regulations to broadband Internet access service, ITI urges the Commission to avoid exposing any component of the Internet ecosystem to onerous Title II regulation. In addition, as ITI has explained, the FCC should clarify that any rules adopted in this proceeding apply exclusively to broadband Internet access service and that they shall not apply to applications, services or

content provided via broadband Internet access service. *See* ITI Comments at 4. Finally, ITI urges the FCC to explore the possibility of private industry solutions wherever possible. For example, the Commission should encourage private parties to develop a set of behavioral requirements (e.g., based on industry best practices) with which private parties would agree to comply, subject perhaps to third-party review of claims that the requirements have been violated. This approach could well achieve the Commission's objectives in this proceeding and possibly other proceedings without the need for federal regulation.

II. Conclusion

The FCC should respond to the *Comcast* case in the manner described herein.

Respectfully submitted,

/s/ Dean Garfield

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